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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 935

MILES LABORATORIES, INC., *Petitioner,*

v.

FEDERAL TRADE COMMISSION, ETC., ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

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OCTOBER TERM, 1943.

No. ....

MILES LABORATORIES, INC., *Petitioner,*

v.

FEDERAL TRADE COMMISSION, a commission created by Act of Congress, and WILLIAM A. AYRES, GARLAND S. FERGUSON, EWIN L. DAVIS, CHARLES H. MARCH, and ROBERT E. FREER, individually and as members of the Federal Trade Commission,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the District of Columbia affirming a judgment of the District Court of the United States for the District of Columbia, which dismissed petitioner's complaint brought under the Federal Declaratory Judgment Act.

OPINIONS BELOW.

The opinion of the District Court on motion to dismiss is reported in 50 F. Supp. 434 (R. 35). The opinion of the Court of Appeals is not yet reported. It will be found in the record at page 45.

JURISDICTION.

The judgment of the Court of Appeals was entered on February 7, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended (U. S. C., Title 28, Sec. 347 (a)).

STATUTES INVOLVED.

The statutes involved are the Federal Declaratory Judgment Act, and portions of the Federal Trade Commission Act and the Federal Food, Drug and Cosmetic Act. The pertinent provisions of these statutes are printed in the appendix to this petition. Rule 57 of the Federal Rules of Civil Procedure, likewise involved, is also printed in the appendix, together with the Advisory Committee notes on that Rule.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

The record in this case contains a complaint for a declaratory judgment (R. 2), motion to dismiss the complaint (R. 34), opinion (R. 35) and judgment of the District Court dismissing the complaint for lack of jurisdiction of the subject matter (R. 42), opinion of the Court of Appeals (R. 45) and its judgment affirming the District Court (R. 49).

Petitioner is an Indiana corporation which manufactures and sells in interstate commerce certain proprietary remedies known as Dr. Miles' Nervine and Dr. Miles' Anti-Pain Pills. The remedies are designed to afford and do afford relief from pain and certain ner-

vous afflictions. The product Nervine contains sedative bromides. Anti-Pain Pills contain acetanilid, which relieves pain in the conditions specified in the labeling (R. 2, 3, 4, 5).

The labeling of these remedies (labeling includes everything appearing on the carton, container and by way of inserts), is under the jurisdiction of the Food and Drug Administration of the Federal Security Agency, acting under the Food, Drug and Cosmetic Act of 1938 (Appendix, page 22). The Act prescribes in minute detail the composition of the labeling, including ingredients, dosage, warnings and the like. The labeling used by petitioner for Nervine and Anti-Pain Pills complies with the Food, Drug and Cosmetic Act and the regulations of the Food and Drug Administration (R. 8). Samples of petitioner's labeling are reproduced in the record at pages 19-24. The labeling sets forth candidly the ingredients of the products, the disorders intended to be treated, the permissible dosage and cautions against overdosage.

Petitioner advertises Nervine and Anti-Pain Pills. The advertising does not set forth the dosage or cautions which appear in the labeling. Every advertisement, however, contains cautionary statements (R. 8), such as—

"Full Directions on Package—Read Them"

Or

"Read Full Directions on Bottle."

Advertising as such is not regulated. *False* advertising is prohibited by the Federal Trade Commission Act, Sec. 12, added by the Wheeler-Lea Act amendments of 1938 (Appendix, page 27). Sec. 12 makes the dissemination of a false advertisement an unfair

or deceptive act or practice in commerce within the meaning of Sec. 5 of the Federal Trade Commission Act. Sec. 15 (a) defines a false advertisement as an advertisement—

> "other than labeling, which is misleading in a material respect; and in determining whether any advertisement is misleading, there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, sound or any combination thereof, but also the extent to which the advertisement fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the commodity to which the advertisement relates under the conditions prescribed in said advertisement, or under such conditions as are customary or usual."

The Federal Trade Commission investigated petitioner's business in Nervine and Anti-Pain Pills and sent it a stipulation (R. 28), charging that it was engaged in unfair or deceptive acts or practices in commerce in that neither petitioner's advertising nor its labeling contained warnings that *excessive* use of Nervine "may be dangerous, causing *mental derangement*" (R. 31) and that *excessive* use of Anti-Pain Pills "may be dangerous, causing *collapse* and/or *dependence upon the drug*" (R. 32). The stipulation, if signed, admitted the truth of these allegations and required petitioner to include these specific additional warnings in its advertising or its labeling. If it chose to include them in the labeling, it need not do so in advertising, other than to say—"Caution, Use Only as

Directed" (R. 32, 33), words already in effect included there (R. 8).

The stipulation makes no more than a passing reference to petitioner's advertising, without citing any specific examples, but sets forth the labeling in full (R. 30, 31) and bases its findings upon the contents of the labeling. The stipulation does not state, and respondents have never contended, that either the advertising or the labeling contains any *false* claims, or that the products advertised are injurious to health, when taken in the dosage and with the frequency recommended. The stipulation confines itself solely to the supposed consequences resulting from so-called *excessive* use.

The communications from the Federal Trade Commission which accompanied the proposed stipulation (R. 25, 26, 27, 28) threatened a proceeding against petitioner, of a kind not specified, if petitioner refused to sign the stipulation. Among the proceedings which the Commission might bring are, a complaint under Sec. 5 of the Federal Trade Commission Act; an injunction proceeding under Sec. 13 (a); or a criminal proceeding under Sec. 14, to be brought by the Attorney General upon certification by the Commission (Appendix, pages 24, 28, 29, 31). Respondents have not denied that it was their intention to proceed against petitioner upon its failure to sign the stipulation and respondents affirmatively stated in their brief in the court below that such a proceeding would be by way of a Sec. 5 complaint, looking to a cease and desist order by the Commission after the taking of testimony.

Petitioner refused to sign the stipulation and shortly thereafter filed its complaint in the District Court

for a declaratory judgment against the Federal Trade Commission and its members, individually and in their official capacity. The complaint alleged that respondents were acting outside the scope of their lawful authority in attempting to tamper with petitioner's labeling and that, as a matter of law, petitioner's advertising was not false or misleading and did not fall within the prohibitions of the Federal Trade Commission Act (R. 13, 14). The complaint pointed out, with respect to labeling, that the jurisdiction of the Food and Drug Administration was exclusive under the facts as set forth (R. 6, 9, 13). As to advertising, the complaint alleged that the warnings demanded (collapse, mental derangement, dependence on the drug) all related to excessive use and not to consequences which might result, as the statute provides, from the use of the products under conditions prescribed or under such conditions as are customary or usual (R. 12, 13, 14). The complaint recited the threats made by the Commission to proceed against petitioner and the great damage and injury to its business which would result now and thereafter (R. 15, 16). The prayers of the complaint sought a declaration of lack of power in the respondents to require what they demanded in the stipulation (R. 16, 17).

Respondents filed a motion to dismiss, which was granted and the complaint dismissed on the ground that the court lacked jurisdiction of the subject matter. The Court of Appeals affirmed, saying in an opinion by Chief Justice Groner (R. 47, 48):

> "Here, as we have seen, appellant's contention is that its advertisements are lawful and hence do

not offend the Act, and that its labels are matters not within the scope of the Act, as the result of which the Commission has no lawful right to issue its complaint in the one case or the other, and that accordingly it ought to be saved the expense and embarrassment of a long and useless Commission proceeding. The Commission denies, and we think correctly, that it is attempting to regulate appellant's labels. All that it said on that subject was to offer that means of correction as a choice which appellant could take or leave as it pleased. However desirable it may be thought that appellant, when challenged as to its methods of business, should have recourse to a court of equity to construe the extent of the Commission's power in a case in which it is made to appear that a public hearing will result in irreparable injury, nevertheless, it has been held so often as not to require citation of authority, that for a Federal Court to assume the right to suspend the Commission's investigation, while it determines controversial questions of law or fact, would be a clear assumption of power it does not possess. The administrative remedy which Congress has provided must be first exhausted. To hold otherwise, the Supreme Court has recently and explicitly said, (*Myers* v. *Bethlehem Corp.*, 303 U. S. 41, 50)

> '* * * would * * * in effect substitute the District Court for the Board as the tribunal to hear and determine what Congress declared the Board exclusively should hear and determine in the first instance.'

That the Supreme Court will change or modify its views in this respect is an 'iridescent dream,' for the trend is decidedly the other way."

* * * * * * * *

"In the present case and on the present record—if the question were open—it might very well be argued that appellant's advertising is neither false nor misleading, when considered in the light of the statutory provision requiring no more than a revelation of all material consequences which may result from the use of the product in the customary way or under the conditions prescribed in the advertisement. But since the matter is not open, we have no occasion to examine or weigh questions of fact or law, since they are in the first instance within the exclusive jurisdiction of the Commission and its decision when made is subject to challenge only as provided in the Act; nor is there anything in the Declaratory Judgment Act which changes this result or creates new rights or increases or extends the jurisdiction of the courts. *Doehler Metal Furniture Co.* v. *Warren,* 76 U. S. App. D. C. 60, 129 F. (2d) 43, 45." (Italics supplied.)

QUESTIONS PRESENTED.

1. Does the fact that one of the parties to a justiciable controversy is a federal administrative agency deprive the District Court of jurisdiction to hear the controversy and give a declaration of rights under the Federal Declaratory Judgment Act?

This question has several aspects, namely:

(a) Does the Declaratory Judgment Act give a remedy in cases of actual controversy with ad-

ministrative bodies except in those cases which involve federal taxes?

(b) Does the history and time of enactment of the Declaratory Judgment Act, and particularly the amendment excluding federal tax claims, indicate the congressional intent to give the Act broader scope than the courts in this case have allowed?

(c) Is it of importance on the question of jurisdiction that the only issue in this case on the merits is one of law—the construction of the Federal Trade Commission Act and the Food, Drug and Cosmetic Act—and that there is no issue of fact presented by the complaint?

(d) What is the nature and extent of the so-called exclusive jurisdiction of the Federal Trade Commission?

2. Does the Federal Trade Commission have authority or jurisdiction to determine the legality or legal sufficiency of language employed by petitioner in the labeling of its products; or is that authority and jurisdiction lodged solely in the Food and Drug Administration?

3. Does the Commission have any authority or jurisdiction to require petitioner to include in its advertising statements of consequences alleged by the Commission as likely to result from the use of the products in quantities and in manner and under conditions *other* than those prescribed in the advertising or labeling and *other* than those which are customary or usual?

4. Has the Commission authority or jurisdiction to require warnings different from or in excess of those adopted by petitioner in conformity with the Food, Drug and Cosmetic Act?

5. Can the petitioner legally be charged with false advertising under the statute for not including in the advertisement additional cautions applying only to *excessive* use?

6. Is it not judicial and administrative economy to prevent the Commission from exceeding its statutory jurisdiction before the time, trouble and expense of an *ultra vires* proceeding is incurred?

SPECIFICATION OF ERRORS TO BE URGED.

The Court of Appeals erred:

1. In affirming the District Court's dismissal of the complaint for want of jurisdiction of the subject matter.

2. In failing to hold that petitioner has a remedy under the Declaratory Judgment Act.

3. In failing to hold that, as a matter of law, respondents are seeking to exercise powers not conferred upon them by the Federal Trade Commission Act.

4. In holding that there is an exclusive administrative remedy which must be pursued before court review can be had.

5. In holding that this novel question, not before adjudicated, is foreclosed by prior rulings of this court.

REASONS FOR GRANTING THE WRIT.

I.

Confusion of the Declaratory Judgment Remedy with the Remedy by Injunction.

Petitioner's complaint presents all the elements of an "actual controversy" under the Declaratory Judgment Act. The complaint shows the invasion of a substantive right, the right to be free from unlawful interference with petitioner's business affairs. It presents a controversy between the parties and a threat by the Commission to proceed against petitioner in some unspecified manner, civil, criminal or administrative. In a suit between private parties, the motion to dismiss would undoubtedly have been overruled and the complaint upheld. *Aetna Life Insurance Co.* v. *Haworth*, 300 U. S. 227; *Nashville, Chattanooga & St. Louis Ry. Co.* v. *Wallace*, 288 U. S. 249.

The Court below rested its decision primarily on the language of this Court in *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, to the effect that a remedy by injunction is not available where the statute provides an administrative procedure which was not followed, although proceedings before the administrative body had started. The issue in the *Myers* case was the presence or absence of interstate commerce, a question of fact.

The Court of Appeals ignored the essential differences between this case and the *Myers* case:

1. In injunction proceedings the absence of another adequate remedy must be affirmatively shown, whereas a complaint for declaratory relief will lie whether or not there is another remedy (Federal Rule 57, Appendix, page 20).

2. Only a question of law—the construction of statutes—is here involved and courts are traditionally better equipped than administrative bodies to determine legal issues.

3. This case had not yet gotten into the channel of an administrative proceeding. There was a threat but no proceeding had been commenced. The possible statutory procedures which might have been adopted by the Commission included not only an administrative hearing and decision but also a possible civil or criminal suit in a District Court.

4. The so-called limited jurisdiction of the Circuit Courts of Appeal to review orders of the Commission only on appeal (Sec. 5 (d) Federal Trade Commission Act, Appendix page 26) refers to final orders and not to *ultra vires* charges and threats where there has been no order and no proceeding.

Under these circumstances it was error for the Court of Appeals to follow the *Myers* case blindly, while expressing doubt of the legality of the position taken by respondents on the merits of this case. Under the entirely different circumstances presented by the present case, the Court of Appeals assumed too much in saying that it is an "*iridescent dream*" to expect this Court to modify the views expressed in the *Myers* case. There is no necessity for modifying such views because they are inapplicable here. This Court should grant the writ in order to correct the error into which the Court below has fallen.

II.

The Plain Intent of Congress was to Apply the Declaratory Judgment Act to this Type of Proceeding.

The Federal Declaratory Judgment Act was signed June 14, 1934. It provided an additional remedy for litigants in the federal courts. There were no exceptions in the statute, so long as the procedural requirements were met. The limitations placed upon the Act in this case are grounded upon decisions like *Myers* v. *Bethlehem Shipbuilding Corp., supra,* rendered subsequent to the enactment of the statute. Congress had every reason to believe, in June 1934, that even the remedy by injunction was available (in the absence of another remedy) where an administrative officer or commission was exceeding his or its authority. *Pierce* v. *Society of Sisters,* 268 U. S. 510; *Terrace* v. *Thompson,* 263 U. S. 197; *Village of Euclid* v. *Ambler Realty Co.,* 272 U. S. 365.* These cases are cited in the report of the Senate Judiciary Committee on the bill. (Senate Report No. 1005, 73rd Congress, 2nd Session). The report stated:

> "The fact is that the declaratory judgment has often proved so necessary that it has been employed under other names for years, and that in many cases the injunction procedure is abused in order to render what is in effect a declaratory judgment. * * * Much of the hostility to the extensive use of the injunction power by the Federal courts will be obviated by enabling the courts to render declaratory judgments."

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* And see also *Stark* v. *Wickard,* .... U. S. ...., 64 Sup. Ct. Rep. 559, February 28, 1944.

At the time the Act was passed, federal law prohibited injunctions in tax cases (R. S. 3224). There was at that time a special statutory procedure for the trial and review of such cases. Nevertheless, the Declaratory Judgment Act was amended August 30, 1935 (C. 289, 49 Stat. 1027) by inserting the words "except with respect to Federal taxes" in subdivision 1. The very fact of this single amendment—there have been no others—supports the argument that Congress did not intend to limit the Act in its application to other controversies between a citizen and a federal administrative agency. Such agencies, as plaintiffs, have time and again made use of the Act for their own purposes. *Federal Deposit Ins. Co.* v. *Records,* 34 F. Supp. 600; *Federal Deposit Ins. Co.* v. *Citizens State Bank,* 130 F. 2d 102; *United States* v. *Fuller,* 20 F. Supp. 839.

Granting that Congress did not intend to substitute the fact finding powers of a court for the fact finding powers of a commission, there is every evidence that it intended the declaratory procedure to be used and useful in determining the scope of the Commission's jurisdiction and its lawful powers. Any other conclusion ignores the state of the law at the time the Act was passed. The decision below amounts to judicial legislation and should be reviewed by this Court.

III.

The Decision of the Court of Appeals is Contrary to the Overwhelming Weight of Authority in Cases Arising under State Declaratory Judgment Acts.

Thirty-four states already had declaratory judgment acts when the federal statute was adopted. Other states have followed suit since that time. The well

established rule under state law is that a declaratory judgment may be granted to settle a controversy involving jurisdiction or powers where one of the parties is an administrator or administrative agency of the state. This follows regardless of special statutory procedures under other state laws. *Gully* v. *Interstate Natural Gas Co.*, 82 F. 2d 145; *Kirn* v. *Noyes*, 262 App. Div. (N. Y.) 581, and cases cited; *State ex rel. Public Service Commission* v. *Blair*, 347 Mo. 220, 146 S. W. (2d) 865; *Dunn & Bradstreet* v. *City of New York*, 276 N. Y. 198, 11 N. E. (2d) 728; *Rockland Power & Light Co.* v. *City of New York*, 289 N. Y. 45, 43 N. E. (2d) 803; *Union Pacific R. Co.* v. *Bean*, 167 Ore. 535, 119 P. (2d) 575; *Scott* v. *Alabama State Bridge Corp.*, 233 Ala. 12; *Duncan* v. *A. R. Krull Co.*, 57 Ariz. 472, 114 P. (2d) 888; *Rubel Corp.* v. *Boland*, 117 Misc. 638, 31 N. Y. S. (2d) 572; *Rahoutis* v. *Unemployment Compensation Commission*, 136 P. (2d) 426 (Oregon, 1943).

While the federal courts, construing a federal statute, are in no way controlled by state decisions under state statutes, it will be exceedingly unfortunate if a cleavage in doctrine is permitted to develop. This is particularly true where the state and federal statutes are to all intents and purposes identical. The question becomes increasingly of public importance as administrative agencies strive to extend their jurisdiction rather than to diminish it. Considerations of public policy make it highly expedient that this Court should review this case to see whether it should not be brought into line with the large number of conflicting state decisions.

IV.

The Declaratory Judgment Procedure is Peculiarly Applicable in this Case Which Involves a Conflict Between the Powers of two Administrative Agencies Acting Under Two Federal Statutes.

The purpose of the Federal Trade Commission, as shown by the stipulation, is to regulate the labeling of plaintiff's products. The stipulation mentions advertising in passing but sets forth the labeling in full. No one can advertise warnings forecasting insanity, collapse or the drug habit and the Commission knows this. By the use of overwhelming pressure, and acting by indirection, it seeks to force petitioner to modify its labeling to include these warnings. In so doing, and despite its protestations to the contrary, it is infringing upon the exclusive jurisdiction of the Food and Drug Administration and is acting contrary to its own statute which expressly denies the Commission any power over labeling (Sec. 15 (a), Appendix page 30). Labeling is governed entirely by the Food, Drug and Cosmetic Act. In compliance with that Act, petitioner has included wholly adequate warnings and directions.

It is highly desirable that the excursions of the Commission into territory belonging to another, coequal body should be subject to judicial supervision before the damage is done and not after a long drawn-out, time and money consuming hearing which will result, as the complaint alleges (R. 15) and the motion to dismiss admits. This petition presents a question of more than ordinary importance. It raises the question of the right of one commission to determine its own jurisdiction in relation to that of another commission or, to put it bluntly, the right of the Federal Trade Commission to steal the jurisdiction of the Food and Drug Administration in order to enlarge its own.

V.

The Federal Trade Commission Act Gives The Commission No Jurisdiction to Require this Type of Warnings in Advertising.

The failure of an advertisement to warn the buying public against possible dangers arising out of *excessive* use of the product advertised does not constitute false advertising under Secs. 12 and 15 (a) of the Federal Trade Commission Act. These sections prohibiting and defining false advertisements were passed by the same session of Congress that enacted the Food, Drug and Cosmetic Act. The two acts are in *pari materia* and should be read together as part of a general plan of control of merchandising of food, drugs and cosmetics. The Federal Trade Act is purely negative on this point. It prohibits that which is false and misleading in advertising. The Food and Drug Act affirmatively prescribes how a drug must be identified and labeled to avoid misbranding. (Secs. 201 (n), 502 (d), 502 (f), Appendix pages 22, 23). Finally, the Food and Drug Act declares generally that a drug shall be deemed misbranded—

> "If it is dangerous to health when used in the dosage, or with the frequency or duration prescribed, recommended, or suggested in the labeling thereof." (Sec. 502 (j), Appendix page 24).

The legislative history is clear that the two acts must be construed together to determine the standards of conduct imposed. All the details of that standard appear in the Food, Drug and Cosmetic Act. Admittedly, nothing in petitioner's advertising is false or misleading. As to consequences which might result from the use of the commodity under the conditions prescribed in the advertisement (Sec. 15 (a), Federal

Trade Commission Act, Appendix page 30), the conditions prescribed are "Full Directions on Package—Read Them", or "Read Full Directions on Bottle". Sec. 15 (a) also speaks of use under customary and usual conditions. The stipulation does not claim that such excessive use as, it says, would produce collapse, insanity or the drug habit is either customary or usual. Common sense would require the contrary conclusion in any event. That was so stated by Congressman Lea, in the debate on the Wheeler-Lea Act of 1938 which gave the Commission jurisdiction over false advertising (Congressional Record, Vol. 83, pages 412, 414).

It affirmatively appears as a matter of law that petitioner is not guilty of false advertising and that it would be to the highest degree unjust to permit the Commission to proceed against petitioner where such action would be outside the scope of the Commission authority. The question is serious enough and of sufficiently wide general application to justify the exercise of this Court's supervisory jurisdiction.

CONCLUSION.

For the reasons stated, the writ should issue as prayed.

Respectfully submitted,

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APPENDIX.

Relevant Parts of Statutes and Other Texts.

Federal Declaratory Judgment Act (adopted June 14, 1934; Judicial Code section 274 d, c. 512, 48 Stat. 955, as amended c. 289, 49 Stat. 1027; Title 28 U. S. C. A., Sec. 400):

"(1) In cases of actual controversy (except with respect to Federal taxes) the courts of the United States shall have power upon petition, declaration, complaint, or other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such.

"(2) Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party, whose rights have been adjudicated by the declaration, to show cause why further relief should not be granted forthwith.

"(3) When a declaration of right or the granting of further relief based thereon shall involve the determination of issues of fact triable by a jury, such issues may be submitted to a jury in the form of interrogatories, with proper instructions by the court, whether a general verdict be required or not."

Federal Rules of Civil Procedure:

"**Rule 57. Declaratory Judgments.** The procedure for obtaining a declaratory judgment pursuant to Section 274 (d) of the Judicial Code, as amended, U. S. C., Title 28, Sec. 400, shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The Court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar."

Notes of Advisory Committee on Rules.

"The fact that a declaratory judgment may be granted 'whether or not further relief is or could be prayed' indicates that declaratory relief is alternative or cumulative and not exclusive or extraordinary. A declaratory judgment is appropriate when it will 'terminate the controversy' giving rise to the proceeding. Inasmuch as it often involves only an issue of law on undisputed or relatively undisputed facts, it operates frequently as a summary proceeding, justifying docketing the case for early hearing as on a motion, as provided for in California (Code Civ. Proc. (Deering, 1937) Sec. 1062a), Michigan (3 Comp. Laws 1929) Sec. 13904), and Kentucky (Codes (Carroll, 1932) Civ. Pract. Sec. 639a-3).

"The 'controversy' must necessarily be 'of a justiciable nature, thus excluding an advisory decree upon a hypothetical state of facts.' Ashwander v. Tennessee Valley Authority, 297 U. S. 288, 325, 56 S. Ct. 466, 473, 80 L. Ed. 688, 699

(1936). The existence or non-existence of any right, duty, power, liability, privilege, disability, or immunity or of any fact upon which such legal relations depend, or of a status, may be declared. The petitioner must have a practical interest in the declaration sought and all parties having an interest therein or adversely affected must be made parties or be cited. A declaration may not be rendered if a special statutory proceeding has been provided for the adjudication of some special type of case, but general ordinary or extraordinary legal remedies, whether regulated by statute or not, are not deemed special statutory proceedings.

"When declaratory relief will not be effective in settling the controversy, the court may decline to grant it. But the fact that another remedy would be equally effective affords no ground for declining declaratory relief. The demand for relief shall state with precision the declaratory judgment desired, to which may be joined a demand for coercive relief, cumulatively or in the alternative; but when coercive relief only is sought but is deemed ungrantable or inappropriate, the court may *sua sponte*, if it serves a useful purpose, grant instead a declaration of rights. Hasselbring v. Koepke, 263 Mich. 466, 248 N. W. 869, 93 A. L. R. 1170 (1933). Written instruments, including ordinances and statutes, may be construed before or after breach at the petition of a properly interested party, process being served on the private parties or public officials interested. In other respects the Uniform Declaratory Judgment Act affords a guide to the scope and function of

the federal act. Compare Aetna Life Insurance Co. v. Haworth, 300 U. S. 227, 57 S. Ct. 461, 81 L. Ed. 617, 108 A. L. R. 1000 (1937); Nashville, Chattanooga & St. Louis Ry. v. Wallace, 288 U. S. 249, 53 S. Ct. 345, 77 L. Ed. 730, 87 A. L. R. 1191 (1933); Gully, Tax Collector v. Interstate Natural Gas Co., 82 F. 2d 145 (C. C. A. 5th, 1936); Ohio Casualty Ins. Co. v. Plummer, 13 F. Supp. 169 (S. D. Tex., 1935); Borchard, *Declaratory Judgments* (1934), *passim.*"

Federal Food, Drug and Cosmetic Act, June 25, 1938, c. 675, 52 Stat. 1040, as amended; Title 21 U. S. C. A., Sec. 301; Reorg. Plan No. IV., Sec. 12, eff. June 30, 1940, 5 Fed. Reg. 2422, 54 Stat. 1237.

Sec. 201(m) "The term 'labeling' means all labels and other written, printed, or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article." (52 Stat. 1041 (m), 21 U. S. C. A. 321(m).)

Sec. 201(n) "If an article is alleged to be misbranded because the labeling is misleading, then in determining whether the labeling is misleading there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, or any combination thereof, but also the extent to which the labeling fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the article to which the labeling relates under the conditions of use prescribed in the labeling thereof or under such conditions of use as are customary or usual." (52 Stat. 1041(n), 21 U. S. C. A. 321(n).)

Sec. 502(d) "(A drug or device shall be deemed to be misbranded) If it is for use by man and contains any quantity of the narcotic or hypnotic substance alpha eucaine, barbituric acid, betaeucaine, bromal, cannabis, carbromal, chloral, coca, cocaine, codeine, heroin, marihuana, morphine, opium, paraldehyde, peyote, or sulphonmethane; or any chemical derivative of such substance, which derivative has been by the Secretary,* after investigation, found to be, and by regulations designated as, habit forming; unless its label bears the name, quantity, and percentage of such substance or derivative and in juxtaposition therewith the statement "Warning—May be habit forming". (52 Stat. 1051(d), 21 U. S. C. A. 352(d).)

Sec. 502(f) "(A drug or device shall be deemed to be misbranded) Unless its labeling bears (1) adequate directions for use; and (2) such adequate warnings against use in those pathological conditions or by children where its use may be dangerous to health, or against unsafe dosage or methods or duration of administration or application, in such manner and form, as are necessary for the protection of users: *Provided,* That where any requirement of clause (1) of this paragraph, as applied to any drug or device, is not necessary for the protection of the public health, the Secretary* shall promulgate regulations exempting such drug or device from such requirement." (52 Stat. 1051(f), 21 U. S. C. A. 352(f).)

* Administrator (Reorg. Plan. No. IV).

Sec. 502(j) "(A drug or device shall be deemed to be misbranded) If it is dangerous to health when used in the dosage, or with the frequency or duration prescribed, recommended, or suggested in the labeling thereof." (52 Stat. 1051(j), 21 U. S. C. A. 352(j).)

Federal Trade Commission Act, September 26, 1914, c. 311, §1, 38 Stat. 717; as amended March 21, 1938, c. 49, §1, 52 Stat. 111; 52 Stat. 114; 15 U. S. C. A. 41.

"Sec. 5. (a) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

"The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to the Civil Aeronautics Act of 1938, and persons, partnerships, or corporations subject to the Packers and Stockyards Act, 1921, except as provided in section 406(b) of said Act, from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

"(b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its

charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by this Act, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the transcript of the record in the proceeding has been filed in a circuit court of appeals of the United States, as hereinafter provided, the Commission may at any time, upon such notice and in such manner as it shall deem

proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require: *Provided, however,* That the said person, partnership, or corporation may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate circuit court of appeals of the United States, in the manner provided in subsection (c) of this section.

"(d) The jurisdiction of the circuit court of appeals of the United States to affirm, enforce, modify, or set aside orders of the Commission shall be exclusive.

"(g) An order of the Commission to cease and desist shall become final—

'(1) Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, but the Commission may thereafter modify or set aside its order to the extent provided in the last sentence of the subsection (b): or

'(2) Upon the expiration of the time allowed for filing a petition for certiorari, if the order

of the Commission has been affirmed, or the petition for review dismissed by the circuit court of appeals, and no petition for certiorari has been duly filed; or

'(3) Upon the denial of a petition for certiorari, if the order of the Commission has been affirmed or the petition for review dismissed by the circuit court of appeals; or

'(4) Upon the expiration of thirty days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the order of the Commission be affirmed or the petition for review dismissed.

"(l) Any person, partnership, or corporation who violates an order of the Commission to cease and desist after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $5,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the United States." (15 U. S. C. A. 45, 38 Stat. 719, 43 Stat. 939, 52 Stat. 111, 52 Stat. 1028.)

"Sec. 12. (a) It shall be unlawful for any person, partnership, or corporation to disseminate, or cause to be disseminated, any false advertisement—

'(1) By United States mails, or in commerce by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly the purchase of food, drugs, devices, or cosmetics; or

'(2) By any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in commerce of food, drugs, devices, or cosmetics.

'(b) The dissemination or the causing to be disseminated of any false advertisement within the provisions of subsection (a) of this section shall be an unfair or deceptive act or practice in commerce within the meaning of section 5." (52 Stat. 114, 15 U. S. C. A. 52.)

"Sec. 13 (a) Whenever the Commission has reason to believe—

'(1) that any person, partnership, or corporation is engaged in, or is about to engage in, the dissemination or the causing of the dissemination of any advertisement in violation of section 12, and

'(2) that the enjoining thereof pending the issuance of a complaint by the Commission under section 5, and until such complaint is dismissed by the Commission or set aside by the court on review, or the order of the Commission to cease and desist made thereon has become final within the meaning of section 5, would be to the interest of the public,

the Commission by any of its attorneys, designated by it for such purpose may bring suit in a district court of the United States or in the United States court of any Territory, to enjoin the dissemination or the causing of the dissemination of such advertisement. Upon proper showing a temporary injunction or restraining order shall be

granted without bond. Any such suit shall be brought in the district in which such person, partnership, or corporation resides or transacts business.

'(b) Whenever it appears to the satisfaction of the court in the case of a newspaper, magazine, periodical, or other publication, published at regular intervals—

'(1) that restraining the dissemination of a false advertisement in any particular issue of such publication would delay the delivery of such issue after the regular time therefor, and

'(2) that such delay would be due to the method by which the manufacture and distribution of such publication is customarily conducted by the publisher in accordance with sound business practice, and not to any method or device adopted for the evasion of this section or to prevent or delay the issuance of an injunction or restraining order with respect to such false advertisement or any other advertisement,

the court shall exclude such issue from the operation of the restraining order or injunction." (52 Stat. 114, 15 U. S. C. A. 53.)

"Sec. 14 (a) Any person, partnership, or corporation who violates any provision of section 12 (a) shall, if the use of the commodity advertised may be injurious to health because of results from such use under conditions prescribed in the advertisement thereof, or under such conditions as are customary or usual, or if such violation is

with intent to defraud or mislead, be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not more than $5,000 or by imprisonment for not more than six months, or by both such fine and imprisonment; except that if the conviction is for a violation committed after a first conviction of such person, partnership, or corporation, for any violation of such section, punishment shall be by a fine of not more than $10,000 or by imprisonment for not more than one year, or by both such fine and imprisonment: *Provided,* That for the purposes of this section meats and meat food products duly inspected, marked, and labeled in accordance with rules and regulations issued under the Meat Inspection Act approved March 4, 1907, as amended, shall be conclusively presumed not injurious to health at the time the same leave official 'establishments.'" (52 Stat. 114, 15 U. S. C. A. 54(a).)

"Sec. 15. For the purposes of sections 12, 13 and 14—

'(a) The term "false advertisement" means an advertisement, other than labeling, which is misleading in a material respect; and in determining whether any advertisement is misleading, there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, sound, or any combination thereof, but also the extent to which the advertisement fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the commodity to which the advertise-

ment relates under the conditions prescribed in said advertisement, or under such conditions as are customary or usual. No advertisement of a drug shall be deemed to be false if it is disseminated only to members of the medical profession, contains no false representation of a material fact, and includes, or is accompanied in each instance by truthful disclosure of the formula showing quantitatively each ingredient of such drug." (52 Stat. 114, 15 U. S. C. A. 55(a).)

"Sec. 16. Whenever the Federal Trade Commission has reason to believe that any person, partnership, or corporation is liable to a penalty under section 14 or under subsection (1) of section 5, it shall certify the facts to the Attorney General, whose duty it shall be to cause appropriate proceedings to be brought for the enforcement of the provisions of such section or subsection." (52 Stat. 114, 15 U. S. C. A. 56.)

(1-D)

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No. 935

In the Supreme Court of the United States

OCTOBER TERM, 1943

MILES LABORATORIES, INC., PETITIONER

v.

FEDERAL TRADE COMMISSION, ETC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals (R. 45–48) is reported at 140 F. (2d) 683. The opinion of the district court (R. 35–42) is reported at 50 F. Supp. 434.

JURISDICTION

The judgment of the Court of Appeals was entered February 7, 1944 (R. 49). The petition for a writ of certiorari was filed April 27, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

STATUTES INVOLVED

The pertinent provisions of the Federal Declaratory Judgments Act and of the Federal Trade Commission Act are printed in the Appendix, pp. 11–18, *infra*.

QUESTION PRESENTED

Whether the district court properly dismissed an action for a declaratory judgment brought by petitioner against the Federal Trade Commission and its individual members to determine the authority of the Commission to issue a potential complaint under Section 5 of the Federal Trade Commission Act.

STATEMENT

Petitioner is an Indiana corporation engaged in the manufacture, sale and distribution in interstate commerce of medicinal preparations known as "Dr. Miles' Nervine," "Dr. Miles' Nervine Tablets," and "Dr. Miles' Anti-Pain Pills" (R. 3). On November 17, 1942, the Federal Trade Commission, acting through its Chief Trial Examiner, notified petitioner that, on the basis of an investigation by the Commission, it appeared that petitioner had failed adequately to reveal the potential danger to health that might result from the improper or continued use of these products, and that it seemed that the methods used by petitioner fell within the definition of the term "unfair methods of competition in commerce"

which the Commission was required to prevent (R. 25). The Commission offered petitioner an opportunity to enter into a stipulation whereby petitioner would admit that it had disseminated advertisements for the purpose of inducing the purchase of these medicinal preparations; that "Dr. Miles' Nervine" and "Nervine Tablets" were advertised for use in cases of functional nervous disturbances, nervous headaches, sleeplessness and restlessness; that the caution appearing on the containers in which these products were packaged failed to include a warning to the effect that excessive use of the products might result in mental derangement and skin eruptions; that "Dr. Miles' Anti-Pain Pills" were advertised for use by persons who occasionally suffered from distress of headache, neuralgia, muscular or periodic pains, and that the caution appearing on the packages failed to include a warning that excessive use of this drug might cause collapse or dependence upon the drug; and that the advertisements of "Nervine" and "Anti-Pain Pills" failed to contain warnings or cautionary statements pertaining to the use of the products. The proposed stipulation then provided that petitioner would either cease and desist from disseminating any advertisements which failed to reveal that excessive use of the preparations might be dangerous in the respects mentioned; or, if the directions for use of the preparations on the labels contained adequate and specific warnings of their potential

danger to health in such respects, the advertisements might contain only the statement "Caution, Use Only as Directed". (R. 28–33.) In the letter enclosing the stipulation, the Chief Trial Examiner stated (R. 26):

> It must be understood that it is your right to have a formal complaint issue and tried in the manner provided by the statute and practices of the Commission; and, if for any reason the disposition of this matter by voluntary cessation is not acceptable to you, your right of defense will be assured by the statutory procedure.

Petitioner declined to execute the stipulation, and instituted an action in the District Court for the District of Columbia against the Federal Trade Commission and its individual members for a declaratory judgment to the effect that the Commission had no right to determine the legality of petitioner's labeling or to force petitioner to vary the language thereof, and that the Commission and its members were exceeding their authority in seeking to compel petitioner to include in its advertisements warnings in respect of consequences which might result from use of the products in a manner other than that specified in the directions on the labels. The complaint alleged that the action of the Commission in demanding that petitioner submit to the terms of the proposed stipulation indicated an intention to assume jurisdiction over petitioner's labeling of

its products and that the threatened action was in excess of the power of the Commission in that the Federal Trade Commission Act does not require warnings against use of products in excess of the recommended dosage. (R. 1–17.)

The respondents' motion to dismiss the complaint for lack of jurisdiction was sustained by the district court on the ground that the question of the Commission's jurisdiction to proceed was a matter to be determined in the first instance by the Commission itself, and that the statutory provision for review of the Commission's action by the appropriate court of appeals was the exclusive method for obtaining judicial review of the Commission's decision (R. 34–43). The judgment of the district court was affirmed on appeal (R. 49).

ARGUMENT

The only action with which petitioner was threatened at the time it commenced this suit in the district court was the initiation of a proceeding under Section 5 of the Federal Trade Commission Act (15 U. S. C. 45) looking toward the issuance of a cease and desist order by the Commission. Petitioner's complaint refers (R. 9–10, 15) to the possibility of criminal penalties under Section 14 (a) of the Act (see Appendix, *infra*, pp. 16–17), but the letter from the Commission's Chief Trial Examiner enclosing the proposed stipulation, a copy of which was annexed to the com-

plaint as an exhibit, indicates clearly that, in the event the stipulation was not accepted, the Commission proposed to issue a complaint to be "tried in the manner provided by the statute and practices of the Commission" (R. 26).[1] Under the statute, such a complaint may issue "whenever the Commission shall have reason to believe" that any person has been or is using any unfair method of competition. Hence, despite the fact that the complaint seeks a declaration that the Commission has no authority to compel petitioner to perform certain acts (see R. 16–17), the suit for a declaratory judgment actually seeks to preclude the Commission from exercising its discretion in the first instance as to whether it has "reason to believe" that petitioner is engaged in unfair practices.

Petitioner in effect concedes that, under the rule laid down by this Court in *Myers* v. *Bethlehem Corp.*, 303 U. S. 41, it would not be entitled to injunctive relief against the Commission under the circumstances here presented; but it argues (Pet. 11) that it is entitled to relief by way of a declaratory judgment. However, the *Myers* case

[1] The possibility of criminal prosecution would, in any event, be too remote to give rise to an actual controversy since, under Section 16 of the Federal Trade Commission Act, violations must first be certified to the Attorney General for prosecution, and there is no allegation in the complaint that such action was contemplated by the Commission or that the Attorney General was threatening to proceed with a prosecution. See *Federal Trade Commission* v. *Claire Furnace Co.*, 274 U. S. 160, 174; *Helco Products* v. *McNutt*, 137 F. (2d) 681 (App. D. C.).

turned not upon the special criteria governing injunctive relief, but upon fundamental principles governing judicial review of the action of administrative tribunals. The *Myers* case held that an injunction should have been refused both because the question involved was one within the primary jurisdiction of the administrative agency and because exclusive jurisdiction to review the administrative action had been vested by Congress in the appropriate court of appeals. The identical factors are present in the instant case.

Petitioner argues that the Commission intends to exceed its jurisdiction by regulating labeling, over which it has no control, and by misinterpreting the definition of false advertising in Section 15 of the Federal Trade Commission Act (Appendix, *infra,* pp. 17–18) to include failure to warn against excessive use of the product. It contends that its allegations in these respects present questions of law as distinguished from the question of fact (the interstate nature of the employer's business) involved in the *Myers* case (Pet. 12, 16–18). It is clear, as the court below pointed out (R. 47), that the proposed stipulation offered by the Commission purported to regulate only false advertising, and that the proposed change in the labeling was offered only as an alternative method of correcting the advertising. The question of the falsity of petitioner's advertisements is as much a matter for the Commission's initial determination as was the question of the inter-

state character of the business involved in the *Myers* case. Whether failure to include warnings against danger from excessive use constitutes false advertising within the broad definition of Section 15, may well depend upon matters of fact, as, for example, whether the representations in the advertisements tend to cause excessive use by persons having the symptoms for which the remedy is indicated, or whether excessive use by such persons is in actual practice customary or usual (cf. *Aronberg* v. *Federal Trade Commission,* 132 F. (2d) 165 (C. C. A. 7)). In any event, it is a question which Congress has relegated to the Commission for initial determination. Hence, resort to judicial review in advance of an administrative determination is premature, by whatever means it is sought. *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, 130; *Elliott* v. *American Manufacturing Co. of Texas,* 138 F. (2d) 678 (C. C. A. 5); *Bradley Lumber Co.* v. *National Labor Relations Board,* 84 F. (2d) 97 (C. C. A. 5), certiorari denied, 299 U. S. 559; *Washington Terminal Co.* v. *Boswell,* 124 F. (2d) 235, 251 (App. D. C.), affirmed, 319 U. S. 732.

Furthermore, Section 5 (d) of the Federal Trade Commission Act (Appendix, *infra,* p. 13) provides that the jurisdiction of the court of appeals to affirm, enforce, modify or set aside orders of the Commission shall be exclusive. The provisions for review are unquestionably adequate to

insure due process. *Ostler Candy Co.* v. *Federal Trade Commission,* 106 F. (2d) 962, 964 (C. C. A. 10), certiorari denied, 309 U. S. 675; *National Candy Co.* v. *Federal Trade Comm'n,* 104 F. (2d) 999 (C. C. A. 7), certiorari denied, 308 U. S. 610. Under such circumstances, the district court is without jurisdiction to issue an injunction. *Myers* v. *Bethlehem Corp.,* 303 U. S. 41; *Chamber of Commerce* v. *Federal Trade Commission,* 280 Fed. 45, 47–49 (C. C. A. 8). It has no greater power to issue a declaratory judgment, for the Declaratory Judgments Act did not transform the carefully designed statutory procedure which confers jurisdiction on one class of courts to the exclusion of others. *Dochler Metal Furniture Co.* v. *Warren,* 129 F. (2d) 43, 45 (App. D. C.); *Bradley Lumber Co.* v. *National Labor Relations Board,* 84 F. (2d) 97, 100 (C. C. A. 5), certiorari denied, 299 U. S. 559. Compare *Great Lakes Dredge & Dock Co.* v. *Huffman,* 319 U. S. 293, 300–301.[2] Manifestly, the fact that the administrative proceeding has not yet been instituted and that petitioner is thus

[2] The state cases cited by petitioner in which declaratory judgments have been used to determine the powers of state administrative agencies (Pet. 15) are inapposite, since many factors are involved other than that an administrative agency is a party. It may be noted, however, that the issues of primary jurisdiction of administrative agencies and the exclusiveness of the statutory remedy are factors considered in state as well as federal cases. See, for example, *Rahoutis* v. *Unemployment Compensation Commission,* 136 P. (2d) 426 (Ore. 1943), cited by petitioner. See also Borchard, *Declaratory Judgments* (1941 ed.), pp. 65, 237, 342–344.

one step further removed from the completion of its administrative remedy does not, as petitioner claims (Pet. 12), give it a right which it would not have had if the proceeding had actually been commenced. Cf. *Federal Power Comm'n* v. *Metropolitan Edison Co.*, 304 U. S. 375, 385.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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TOM C. CLARK,
Assistant Attorney General.

ROBERT S. ERDAHL,
Special Assistant to the Attorney General.

BEATRICE ROSENBERG,
Attorney.

MAY 1944.

APPENDIX

Section 27D of the Judicial Code, Act of June 14, 1934, c. 512, 48 Stat. 955, as amended by the Act of August 30, 1935, c. 829, § 405, 49 Stat. 1027, 28 U. S. C. 400, provides in part as follows:

> (1) In cases of actual controversy (except with respect to Federal taxes) the courts of the United States shall have power upon petition, declaration, complaint, or other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such.

The Federal Trade Commission Act of September 26, 1914, c. 311, 38 Stat. 717, as amended by the Act of March 21, 1938, c. 49, 52 Stat. 111, 1028, 15 U. S. C. 41 ff., provides in pertinent part as follows:

> SEC. 5. (a) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.
>
> The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to the Civil Aeronautics Act of 1938, and persons, partnerships, or corporations subject to the Packers and Stockyards Act, 1921, except as provided in section 406 (b) of said Act, from using

unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

(b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by this Act, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist

from using such method of competition or such act or practice. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the transcript of the record in the proceeding has been filed in a circuit court of appeals of the United States, as hereinafter provided, the Commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require: *Provided, however,* That the said person, partnership, or corporation may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate circuit court of appeals of the United States, in the manner provided in subsection (c) of this section.

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(d) The jurisdiction of the circuit court of appeals of the United States to affirm, enforce, modify, or set aside orders of the Commission shall be exclusive.

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(g) An order of the Commission to cease and desist shall become final—

(1) Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, but the Commission may thereafter modify or set aside its order to the extent provided in the last sentence of the subsection (b); or

(2) Upon the expiration of the time allowed for filing a petition for certiorari, if the order of the Commission has been affirmed, or the petition for review dismissed by the circuit court of appeals, and no petition for certiorari has been duly filed; or

(3) Upon the denial of a petition for certiorari, if the order of the Commission has been affirmed or the petition for review dismissed by the circuit court of appeals; or

(4) Upon the expiration of thirty days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the order of the Commission be affirmed or the petition for review dismissed.

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(l) Any person, partnership, or corporation who violates an order of the Commission to cease and desist after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $5,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

* * * * *

SEC. 12. (a) It shall be unlawful for any person, partnership, or corporation to disseminate, or cause to be disseminated, any false advertisement—

(1) By United States mails, or in commerce by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly the purchase of food, drugs, devices, or cosmetics; or

(2) By any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in commerce of food, drugs, devices, or cosmetics.

(b) The dissemination or the causing to be disseminated of any false advertisement within the provisions of subsection (a) of this section shall be an unfair or deceptive act or practice in commerce within the meaning of section 5.

SEC. 13. (a) Whenever the Commission has reason to believe—

(1) that any person, partnership, or corporation is engaged in, or is about to engage in, the dissemination or the causing of the dissemination of any advertisement in violation of section 12, and

(2) that the enjoining thereof pending the issuance of a complaint by the Commission under section 5, and until such complaint is dismissed by the Commission or set aside by the court on review, or the order of the Commission to cease and desist made thereon has become final within the meaning of section 5, would be to the interest of the public,

the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States or in the United States court of any Territory, to enjoin the dissemination or the causing of the dissemination of such advertisement. Upon proper showing a temporary injunction or restraining order shall be granted without bond. Any such

suit shall be brought in the district in which such person, partnership, or corporation resides or transacts business.

(b) Whenever it appears to the satisfaction of the court in the case of a newspaper, magazine, periodical, or other publication, published at regular intervals—

(1) that restraining the dissemination of a false advertisement in any particular issue of such publication would delay the delivery of such issue after the regular time therefor, and

(2) that such delay would be due to the method by which the manufacture and distribution of such publication is customarily conducted by the publisher in accordance with sound business practice, and not to any method or device adopted for the evasion of this section or to prevent or delay the issuance of an injunction or restraining order with respect to such false advertisement or any other advertisement,

the court shall exclude such issue from the operation of the restraining order or injunction.

SEC. 14. (a) Any person, partnership, or corporation who violates any provision of section 12 (a) shall, if the use of the commodity advertised may be injurious to health because of results from such use under conditions prescribed in the advertisement thereof, or under such conditions as are customary or usual, or if such violation is with intent to defraud or mislead, be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not more than $5,000 or by imprisonment for not more than six months, or by both such fine and imprisonment; except that if the

conviction is for a violation committed after a first conviction of such person, partnership, or corporation, for any violation of such section, punishment shall be by a fine of not more than $10,000 or by imprisonment for not more than one year, or by both such fine and imprisonment: *Provided,* That for the purposes of this section meats and meat food products duly inspected, marked, and labeled in accordance with rules and regulations issued under the Meat Inspection Act approved March 4, 1907, as amended, shall be conclusively presumed not injurious to health at the time the same leave official "establishments."

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SEC. 15. For the purposes of sections 12, 13, and 14—

(a) The term "false advertisement" means an advertisement, other than labeling, which is misleading in a material respect; and in determining whether any advertisement is misleading, there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, sound, or any combination thereof, but also the extent to which the advertisement fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the commodity to which the advertisement relates under the conditions prescribed in said advertisement, or under such conditions as are customary or usual. No advertisement of a drug shall be deemed to be false if it is disseminated only to members of the medical profession, contains no false representation of a material fact, and includes, or is accompanied in

each instance by truthful disclosure of, the formula showing quantitatively each ingredient of such drug.

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SEC. 16. Whenever the Federal Trade Commission has reason to believe that any person, partnership, or corporation is liable to a penalty under section 14 or under subsection (l) of section 5, it shall certify the facts to the Attorney General, whose duty it shall be to cause appropriate proceedings to be brought for the enforcement of the provisions of such section or subsection.

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